STARTING B2C E-COMMERCE IN EUROPE: LEGAL RISKS AND CHALLENGES

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Abstract:

B2c E-commerce enjoys a continuous growth in Europe. However, when considering a step-in, regards is to be had to the specific legal framework that is relevant to EU B2c e-commerce. EU Consumer law is highly protective and mandatory, not allowing to derogate from these rules. Consumers enjoy a two years warranty, have two weeks' time after delivery to withdraw from the contract and the risk for any delay or damage during the delivery rests upon the seller. As European transport law, which is to a large extend equally mandatory, provides only for a very limited compensation in case of loss or delay, the seller's liability is not back to back with that of the carrier, leaving the seller with a recourse gap. The same is true in case of defects in the relation with the previous seller in the chain. In this article by means of a study of legislation, case law and doctrine, this article investigates how big the liability risks are for web shops in Europe.

Keywords: *e-commerce; liability; consumer protection; carriage law*

Introduction: the legal framework

The relevant legal framework for e-commerce consists of mainly mandatory liability rules: both consumer law and carriage law are mandatorily applicable. Moreover, both sets of rules are supranational or international, creating to a large extend uniformity in law within the European Union.

Starting with the consumer law, there is a two tier consumer protection. The first tier consists of the Consumer Rights Directive,[1] with amongst others rules on market information, the right of withdrawal and the passing of risk. The second tier consists of the Consumer Sales Directive,[2] with rules on the guaranty period in case of a consumer sale. As both instruments are European Union Directives, Member States have to implement these rules in their national legislation, without however being able to lower the level of protection offered by the Directives.[3]

The liability of the air, road and rail carrier is not governed by EU instruments, but by international Conventions. Here, in case of air carriage the Montreal Convention applies in 111 countries around, while CMR and COTIF-CIM are applicable in Europe to road and railroad transportation. Both COTIF-CIM and the Montreal Convention can be applicable door-to-door in case of parcel deliveries, as COTIF-CIM applies to accessory road transportation in addition to a rail transport contract[4] and the Montreal Convention installs a presumption according to which loss that took place during loading or delivery is considered to have taken

[1] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, L 304/64, 22 November 2011.
[2] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees,
[3] Art. 1 *jo.* Art. 8 Consumer Sales Directive. Under the consumer rights Directive any change to the level of protection is in general prohibited, also when it's in favour of the consumer: Article 4 Consumer rights Directive ("*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive*.")
[4] Art. 1.3 COTIF-CIM.

place during the carriage by air, subject to proof of the contrary.[5] Important characteristics of these carriage Conventions are the abstract calculation of damage (in general no compensation for consequential damage or reputation damage) and the limited liability of the carrier: in case of loss or damage, the carrier will, depending on the mode of transportation, only have to compensate between 8,33 (in case of road carriage) and 19 (in case of air carriage) SDR/kg per kilogram. Both characteristics are in case of e-commerce often very relevant. This is especially true for the limited liability in case of a webshop with high value electronics.

Risk for damage/ delay during delivery

Seller bears risk for transportation under the sales contract

The first risk that can be encountered when engaging in e-commerce is the risk for loss, damage or delay during shipment. According to article 20 of the consumer rights directive, the risk only passes to the consumer when the consumer or a third party indicated by the consumer, has acquired the physical possession of the goods. Therefore, this risk for loss, damage or delay during shipment, rests upon the seller. Thus the seller will have to compensate the buyer, only being able to start a recourse action against the carrier. On this point, there can be however a substantial recourse gap between the seller's liability exposure and damage and the liability exposure of the carrier.

Compensation for loss/damage or delay under the sales contract

Compensation for damage

While the risk for damage during transportation is put upon the seller by the consumer rights Directive, the remedies available to the buyer in case of loss or damage during the shipment, are to be found in the consumer sales Directive.[6] There is a requirement for fault-free delivery under the Consumer Sales Directive. Article 5(3) of that Directive stipulates that the burden of proof that the goods were delivered free of defects lies with the seller if a defect appears within six months of delivery.

[5] Art. 18.4 Montreal Convention.

[6] See art. 3(1) Consumer Sales Directive, see on the link between the two Directives (European Commission DG Justice, 2014, 58). (hereinafter referred to as "Guidance document Consumers Rights Directive")

Priority remedies

When the damage appears immediately, or within 6 months (see further), the buyer is entitled to reparation or replacement of the damaged package, and this free of any charge[7] and within a reasonable time.[8]

Where the Directive requires the reparation or replacement to be free of charge, this doesn't only refer to the costs of the reparation itself, but to all the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

The replacement or reparation has to be performed within a reasonable period, taking account of the nature of the goods and the purpose for which the consumer required the goods.[9] The fact that the purpose is to be taken into account to assess the reasonability of the reparation time, is of great relevance in case of gifts bought trough e-commerce. The purpose of Christmas- or Valentine's Day presents is to give them as a gift for Christmas or Valentine's Day. Consequentially, without reparation or replacement in a very short time frame, the seller will not have met these requirements and the buyer will be entitled to the subsidiary remedies.

Subsidiary remedies

If reparation or replacement is not possible, or doesn't happen within a reasonable time or without inconvenience for the buyer, he is entitled to an appropriate reduction of the price or, alternatively, he can choose to have the contract rescinded.In addition to these remedies available under the Consumer Sales Directive, the buyer can claim an additional compensation under general contract law.[10]

Compensation for loss or delay

Both in case of loss and delay, the buyer is confronted with a situation where he doesn't get the parcel delivered at the time agreed upon or, if no such time for delivery was agreed upon, within a reasonable time. According to the European Commission, 30% of consumers were confronted with delay in delivery and 8% with packages that were never delivered.[11] For this reason, the Directive puts the risk for loss or delay with the seller.[12] Here, however remedies available to the buyer are much more limited. First of all, if no time for delivery has been agreed upon explicitly, no remedy is available during the first thirty days. Only if delivery is delayed for a longer period, and the seller doesn't manage to make delivery within an additional time for delivery provided by the buyer, the buyer is entitled to terminate the contract.[13]

If, however, delivery within the agreed delivery time is essential, taking into account all the circumstances attending the conclusion of the contract or if the consumer informs the trader, prior to the conclusion of the contract that delivery by or on a specified date is essential, the buyer can terminate the contract if delivery wasn't made before this date.[14] Such situations don't only exist in case of explicit notice of the buyer, but also for example the seasonal character of presents, such as Christmas gifts or Valentine presents, could be considered by courts as relevant circumstances, allowing the buyer to terminate the contract in case of a late delivery. In such situations even if no delivery time is explicitly agreed upon, a delay of a few days could entitle the buyer to terminate the contract. Moreover the Regulation explicitly mentions that in addition to the termination, the buyer can have recourse to remedies that are available in national law.[15] However, as general contract law is to a large extend non-mandatory, webshops can include exoneration clauses, exonerating them from liability for further compensation under general contract law.

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[7] Art. 3(2) Consumer Sales Directive
[8] article 3 (3) in fine Consumer Sales Directive
[9] article 3 (3) in fine Consumer Sales Directive
[10] See for example: Article1649 quinquies BW; , § 1 B.W. Court of Appeal Ghent 19 October 2012, NJW 2014, volume 294, 32 (in this case a compensation for moral damage was awarded).
[11] European Commission, 2014
[12] Art. 18.1 Consumer Rights Directive.
[13] Art. 18.2 Consumer Rights Directive.
[14] Article 18.2 *in fine* Consumer Rights Directive.
[15] Art. 18.4 Consumer Rights Directive.

Compensation for loss/ damage or delay under the carriage contract

If the damage, delay or loss to the parcel came into existence during the time the goods were in the custody of the carrier, the seller can claim compensation from the carrier. However, this compensation will be limited. First of all, often there are limits to the recoverable damage. Furthermore, under all mandatory carriage conventions there are limits to the compensation. Especially in case of high value consumer goods, these limits often don't correspond with the actual value of the goods. Consequently the shipper will often by far not be compensated in full, but only to a very limited extend. Even though in case of a severe fault of the carrier or his servants or agents compensation in full is possible, the thresholds for such claim are so high that this possibility is to a large extend merely virtual.

Limits to the recoverable damage

When the carrier doesn't deliver the goods in time and without any damage, multiple types of damage can arise for the seller: apart from the loss of the value of the goods there will also be loss of profit. Moreover for some types of goods, value added taxes and or excise duties might remain due. In addition, especially in case of online purchase of presents, where the buyer needs the present on a specific moment in time, the lack of timely delivery of an undamaged parcel, can create questions as to the reliability of the web shop and can thus lead to severe reputation damage.

Both under CMR and COTIF-CIM only the market price or normal value of the goods at the time and place where the goods were accepted for carriage is taken into account to calculate the compensation.[16]In addition to this market value, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded.[17]

However, as art. 23.4 CMR explicitly mentions, "*no further damage shall be payable".*[18]Consequently reputation damage, loss of profit or (other) consequential damage is excluded from compensation. On the point of value added taxes and excise duties, the question whether compensation for such duties is possible is under CMR answered differently in national jurisdictions. According to for example Belgian and UK case law, irrespective of the fact whether these duties were prepaid or rather become due because of the loss, the carrier is to pay compensation.[19] In German and Dutch Case law [20]however, article 23.4 is interpreted narrowly and compensation is only awarded insofar these duties were prepaid. The difference between both perspectives is very relevant as compensation for these value added taxes and excise duties, if due, is due in full and not subject to any limitations (see next title). Under COTIF-CIM uncertainty on this point is no longer possible, as the '99 protocol explicitly provides that compensation is only required for "*customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending those duties."*[21]

The aforementioned limitations to the recoverable damage don't apply under the Montreal Convention. The same is true for compensation in case of delay under CMR or COTIF-CIM. However, as also here low limits to compensation apply, in practise the extent to which any of these additional types of damage will be recovered is very limited.

Limits to compensation

CMR, COTIF-CIM and the Montreal Convention all apply limits to compensation in case of loss, damage or delay. Originally these limits envisaged to protect the shipper, as they prevented the inclusion of

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[16] Art. 23.1 and 2 CMR; Art. 30.1 COTIF-CIM.
[17] Art. 23.4 CMR.
[18] See also Art. 30§1 COTIF-CIM.
[19] Cass. Be. 30 May 2002, www.unidroit.info; CA 11 February 2003, *E.T.L.* 2004, 697.
[19] Art. 30.4 COTIF-CIM
[20] Court Amsterdam 30 March 1977, S&S 1978, 36; BGH 26 June 2003, *TranspR.* 2003, 453
[21] Art. 30.4 COTIF-CIM

exoneration clauses going beyond these limits, while the limits reflected the average value of the goods.[22] Today, however, for a considerable segment of goods sold by webshops, this is no longer the case. For these goods the limits now instead of constituting a protection for the shipper, rather protect the carrier. An important reason for the inadequate level of the limits lies in the fact that most of these limits date back to the pre-electronics age. Moreover, most Conventions lack an indexation mechanism,[23] causing ongoing decrease of the actual value of the compensation. [24]

Limits in case of damage or loss

The limits in case of loss or delay are set at 8,33 SDR per kilogram under CMR,[25] 17 SDR per kilogram under COTIF-CIM[26] and 19 SDR per kilogram under the Montreal Convention.[27]As one SDR equals USD 1.411560 [28], for a considerable share of e-commerce shipments,[29] this compensation will be inadequate. This is for example the case for most of consumer electronics and luxury products.

This can be evidences by some examples. If a webshop sells an Ipad Air 2, and those Ipads are delivered damaged to the consumer, the webshop will in accordance with article 20 Consumers Rights Directive *junctoa*rticle 3 Consumer Sales Directive, have to replace or repair the Ipad. The webshop itself however, will in case the Ipad was delivered by a road carrier get a compensation of USD 7: the weight of an Ipad is +/- 600 gramsincluding packing materials,[30] and 8,33 SDR per kilo amounts to 11,76 USD per kilogram. This leaves the webshop of course with a substantial recourse gap.

While an Ipad of course has a high value to weight ratio, the recent DPD-case of the Court of Appeal of Antwerp offers an even more imaginative example. In the DPD-case[31] a Belgian jeweller sold a pocket watch with a value of € 7000 to a Suisse client. The watch needed to be delivered in Switzerland, so the jeweller concluded a contract with a predecessor of DPD. The contract contained no specific provisions as to the mode of transportation. The watch was collected in Belgium by a carrier on December 28, and should have been delivered in Switzerland before January 1. However, delivery never occurred. As the jeweller suspected that the carrier still possessed the watch, he initiated legal proceedings. His main claim was to order DPD to hand over the watch. Subsidiary he claimed 12 500 euro damages. DPD invoked the applicability of CMR. Hence, DPD invoked the exemption ground of art. 17 4 b) CMR to avoid liability. In any event, DPD claimed that its liability was limited to 1,79 euro, in accordance with article 23 CMR. Eventually, the Court of Appeal held that CMR was not applicable in this case, as the means of transportation was not agreed upon and thus no contract for the carriage of goods by road was concluded. Therefore the conditions for the applicability of CMR were not fulfilled (see further under Exception: inapplicability of the Conventions). However, if the means of transportation would have been agreed upon, the compensation for the 7000 euro watch, would indeed have been limited to euro 1,79.

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[22] See about this balance for example the preparative works of the Rotterdam Rules : United Nations Commission on International Trade Law, 2006, para. 163 *("[T]he optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet ... provide for a proper allocation of risk between the commercial parties.")* See also in this respect: K. Lannan, 2009; see also: J. Ramberg, 2004, 139.

[23] The Montreal Convention has such mechanism (Article; 24 Montreal Convention), and here limits were increased already by 12% since the coming into existence of the Convention in 1999.

[24] See about this inflation an earlier study: Verheyen, W. 2013, 10. (In this studies we calculated that based on the price evolution of commodities, the limit of 8,33 SDR that was established in 1978, would today correspond with a limit of 17. 3 SDR/kg. If we would calculate this limit taking into account the 1978 SDR/USD dollar exchange rate and the inflation of USD since then, the limit of 8,33 SDR, would today even correspond with a limit of 29 SDR per kilogram. See also on this issue:Lannan, K. 2009, 910; Larsen, P.B. 1983-'84; R. Loewe, 1996; Haak, K.F. 2006, 74-75; Herber, R. 2004, 93 (According to the last author, the 1956 limit (the year when CMR was drafted) even corresponded with a compensation of 63 SDR in 2004.); Sturley, M.F. 2007-2008, 259; Tetley, W. 1995, 146-147

[25] Art. 23.3 CMR.

[26] Art. 30 §2 COTIF-CIM.

[27] Art 22 §3 Montreal Convention.

[28] Exchange rate on February 24 2015, http://www.imf.org/external/np/fin/data/rms_sdrv.aspx

[29] Typical goods sold through e-commerce are electronic equipment, books and clothes , see: Meschi, M., Irving, T., Gillespie, M., 2011, 51.

[30] https://www.apple.com/ipad/compare/

[31] Antwerpen 31 Oktober 2011, 2010/AR/875, *N. V. DPD Belgium/ P. J. Timmermans*, *ETL* 2013, 82

Limits in case of delay

Under the Montreal Convention, the same limit applies to damage caused by delay in delivery. Under CMR and COTIF-CIM, a separate limit in case of delay applies, that relates to the freight (the carriage charges that were paid). Under CMR the compensation is limited to the freight, while under COTIF-CIM it is limited to four times the freight. As pointed out higher, consequential damage such as reputation damage can be claimed in case of delay. However, a compensation that is limited to the freight, will by far not be sufficient to cover reputation damage in case of time-critical deliveries, such as seasonable presents. In addition to reputation damage, in such situations the buyer is also entitled to terminate the contract,[32] causing a loss of profit for the webshop. Moreover, sometimes the loss is not limited to a loss of profit: for example agenda's, calendars and to a smaller extend also DVD's, books and consumer electronics, quickly loose value after their release. After mid-January hardly anyone will be interested in buying a calendar, making the calendars coming back after a termination of the contract due to late delivery virtually worthless. However, also such cases are considered as cases of delay instead of cases of loss or damage, thus limiting the compensation to the freight that was paid. This will in case of regional delivery often be limited to a few dollars.[33]In France, for a contract that did not fall under CMR, but where parties contractually incorporated the convention, the Supreme Court even held that this limit was in such case not applicable, as it creates a complete erosion of the express courier's essential obligation to deliver timely.[34] Of course, due to the priority of international law, in situations falling under CMR, the court could never decide in this way.

Breaking the limits

Due to both the limits to the recoverable damage and the limits to the compensation, an appealing possibility might be to try to break through the limits to compensation. This is however only possible under CMR and COTIF-CIM. However, the threshold for such breakthrough is very high: under CMR wilful misconduct or a fault that is considered as equivalent to wilful misconduct in the national law of the court seized is required,[35] and COTIF-CIM requires that "*the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result*".[36]

A first problem when trying to break through the limits, lies in the fact that the burden of proof rests on the claimant. However, often it will be virtually impossible to get inside information on the circumstances in which the loss came into existence. For example in the aforementioned DPD-case, never any evidence was produced with regards to the circumstances in which the loss took place. Thus, even though for example inside jobs give ground to break through the limits,[37] often the evidence to establish that the theft was committed by an employee will be lacking.

A second problem in case of air-road or air-rail transport, lies in the fact that limits are unbreakable under the Montreal Convention and that also loss or damage at the airport falls within the scope of this Convention. This can especially be a problem because many parcel delivery companies have their distribution centre within the airport boundaries. Moreover, in case of non-localised damage, the Montreal Convention installs a presumption that damage took place during the air transport. Again, this takes away every incentive for the carrier to produce evidence with regards to the actual circumstances in which the loss or damage took place.

An additional problem that exists especially for CMR is that some countries, such as Belgium don't recognise a fault that is equivalent to wilful misconduct.[38] Thus wilful misconduct can only be invoked successfully if the actual wilful misconduct is established. Here, not only the behaviour itself needs to constitute a wilful misconduct (what could be for example the case in delivery on the driveway, a common

[32] See above, Compensation for loss or delay.
[33] Calculation through Wwwaaps.ups.com
[34] Cass. fr. 30 May 2006, n° 04-14. 974, *Bull*, 2006, IV, n° 132, 134
[35] Art. 29 CMR
[36] Art. 36 COTIF-CIM.
[37] See for example art. 29.2 CMR
[38] Cass. 27 januari 1995 *Arr. Cass.*1995, 93, *Pas.*1995, I, 92; *R.W.* 1994-95, 1268, *T.B.H.* 1995, 232.

problem in practice),[39] but moreover it is required that the wilful misconduct envisages the loss of or damage to the cargo. This can be the case for example if delivery is being made to a third person, who did not have authority to take delivery.[40]

Declaration of value or special interest in delivery

Even though a successful attempt to break through the limits of liability is not very likely,most conventions do provide for an "escape-clause", that allows the shipper to declare the value of the goods,[41] or a specific interest in the delivery of the goods.[42] This second possibility can be used in order to get a compensation for for example reputation damage. If the shipper uses this opportunity, compensation will be available up to the declared value or interest.[43] However, the shipper will, when dealing with a parcel delivery service, very often lack the bargaining position to insist on this value declaration in the contract and anyway a surcharge will have to be paid for this service. In any event, it is clear that, if the shipper wants to really safeguard his interests, he should not rely on the presumed protection of carriage conventions, but rather take out sufficient insurance coverage.

Risk for changed consumer preferences

Even if the package arrived timely and in good order to the consumer, still the consumer possesses of a period of 14 calendar[44]days to withdraw from an online sales contract, without giving any reason, and without incurring any costs.[45]

Time for withdrawal

As the purpose of this right is to allow the buyer to evaluate the product, the fourteen day period only starts running after the buyer gained actual possession of the goods. If one order is being delivered in multiple deliveries, the period even only starts running after the last delivery has been made.[46]This doesn't prevent the buyer howeverfromwithdrawing before delivery or even to refuse to take delivery.[47] This can be useful if after the purchase on another website a better offer is found.[48] Therefore a "discount in case of better offers elsewhere"-policy shouldn't merely be a matter of convincing consumers to purchase, but also to prevent them from making use of their right to withdraw.

Even though the right to withdraw the contract in principle ends after 14 working days, in some situation the buyer can withdraw after the end of the 14 days period. First of all, if the period ends on a Saturday, Sunday or Holiday, it needs to be extended to the next working day.[49] A more far going prolongation of the right to withdraw can be found in article 10 Consumer Rights Directive. This article provides for an extension of the right of withdrawal period if the trader has not provided all the information about the conditions, time limit and procedures for exercising the right of withdrawal, as outlined in article 6. In that case the right to withdraw ends 12 months after the end of the initial 14 days period.[50] Moreover it is not sufficient that the information is communicated to the buyer, but this needs to happen in such a way that it can be stored by the consumer.[51] Making it available through a hyperlink doesn't fulfil this

[39] See for some testimonies: BBC, 2012
[40] Kh. Thume, 2007,716.
[41]Art. 24 CMR; Art. 34 COTIF-CIM.
[42] Art. 26 CMR; Art. 35 COTIF-CIM, Art. 22§3 *in fine* Montreal Convention.
[43] For example Haak advocates that if a shipper wants to ship goods with a value of over 8,33 SDR/kg, he should simply make use of this possibility to declare the value. (K.F. Haak, 2006, 75).
[44] For the fact that it concerns calendar days, see: recital 41 Consumer Rights Directive. See also: Guidance document consumers Rights Directive, 37.
[45] Article 9.1 Consumers Rights Directive.
[46] Article 9.2 Consumers Rights Directive.
[47] Recital 40 Consumers Rights Directive.
[48] Guidance document consumers Rights Directive, 39.
[49] Art. 3(4) Council Regulation No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits
[50] Art. 10 Consumer rights Directive.
[51]Art. 5 Consumer rights Directive.

condition.[52]Consequentially, it is essential to provide all information about the right for withdrawal: when a consumer exercises the right to withdraw the contract one year after the purchase, this might greatly impact the residual value of the product.

Use of the goods before the withdrawal

Another element that greatly impacts the residual value of the product after a withdrawal is the fact that in order to properly evaluate the product that was purchased, the consumer is entitled to use the product. However, this use shouldn't go beyond what is necessary to establish the nature, characteristics and functioning of the goods.[53] Recital 47 further specifies the limits to this use: "the consumer should only handle and inspect them in the same manner as he would be allowed to do in a shop."[54]The burden of proof that the product was used beyond what was necessary lies with the seller.[55]Nonetheless, even if a more extensive use of the product is established, this doesn't deprive the buyer from the right to withdraw. In such case, the buyer will however be liable for the additional decrease of value that was caused by this use. An exception to this principle is again the case where the buyer was not informed about the (conditions to) the right to withdraw.[56] In such case the consumer can make unlimited use of the product before sending it back, without the seller being able to deduct part of the compensation. Combined with the 12 months withdrawal period, the sanction for not informing the consumer amounts to a "one year for free", very likely to eliminate all residual value for the seller.

Exercise of the right of withdrawal

The procedure for the consumer to exercise the right to withdraw from the contract is not formalistic. Even though it is not sufficient to merely send the package back or to refuse delivery, any unequivocal statement is sufficient to exercise this right.[57] In theory this statement could even be made orally, but as the burden of proof lies with the buyer, Recital 44 advices to use a durable medium.[58]

After the goods are sent back, the webshop has to refund the consumer with undue delay. Even though no specific deadline is put forward in the Regulation, the guidance document stipulates that this should be done within a few working days.[59]The webshop is not allowed to give a voucher for a next purchase instead of an actual compensation, except if the initial purchase was made using such voucher.[60]In principle, the costs for sending back to goods lie with the consumer. This is however only true insofar the webshop again informed the consumer about the costs of returning or made a reasonable estimation thereof.

Exceptions to the right of withdrawal

For some types of goods the Directive excluded the right of withdrawal. This is for example the case for goods that were made to the consumer's specifications or that were clearly personalised.[61] As an exception to the general rule, this exception must be interpreted narrowly. Therefore, only if the goods are unique and produced according to the specific wishes and requirements stated by the consumer, the right to withdraw should be excluded on this ground. Situations where this condition is fulfilled are for example the sale of

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[52] ECJ C-49/11, 5 July 2012 (Content Services Ltd / Bundesarbeitskammer), DCCR 2012, 97, 45

[53] Art. 14(2) Consumer rights Directive.

[54] For some examples see Guidance document Consumers Rights Directive, 47: "*Before purchasing audio/video and recording equipment, the consumer would normally be able to test the image or sound quality; Trying on a garment in a shop would not involve the removal of the manufacturer's tags; The consumer would not normally be able to practically test household appliances, such as kitchen appliances, the actual use of which unavoidably leaves traces; The consumer would not be able configure software on a computer; hence reasonable costs for any resetting of such equipment would also constitute diminished value*."

[55] See in this respect also: ECJ C-489/07 *Pia Messner v Firma Stefan Krüger*,, ECR 2009 I-07315

[56] Art. 14(2) Consumer rights Directive.

[57] Recital 44 Consumer Rights Directive.

[58] See also: Guidance document Consumers Rights Directive, 42.

[59]Guidance document Consumers Rights Directive, 46.

[60] Recital 46 Consumer Rights Directive; see also: Guidance document Consumers Rights Directive, 42.

[61] Art. 16(c) Consumer Rights Directive.

tailor-made curtains,[62] address labels with the consumer's contact information or T-shirts with a personalised print.[63]If on the contrary the consumer merely picks from the standard (pre-set) options provided by the trader, such as colour or additional equipment in a car, this condition is not fulfilled.[64]

Other important exceptions to the right of withdrawal exist for goods which are liable to deteriorate or expire rapidly [65]and sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery.[66] An example that can fit into both categories are food products. For hygiene reasons, also for for example cosmetics the withdrawal right is excluded.[67]

Further exceptions that are relevant in an e-commerce context, exist for sealed audio, sealed video recordings or sealed computer software which were unsealed after delivery[68] and digital content which is not supplied on a tangible medium.[69] In the second situation the right of withdrawal is however only excluded insofar he performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal.[70]

Risk for damage to the goods after delivery

Even after the 14 days period has passed, the seller is still not out of the zone of danger: according to the Consumer Sales Directive, the seller is liable for any lack of conformity that becomes apparent within two years as from delivery of the goods.[71]As the remedies for the consumer were already dealt with above under the heading "Compensation for damage", the focus here lies with the question what constitutes a lack of conformity,the procedure and the right for redress against a previous seller in the chain.

Lack of conformity

Art. 2.2 and 2.4 explain more in depth what constitutes a lack of conformity. These rules very much resemble those of article 35 of the CISG.[72] Thus, goods are only in conformity if they comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model,[73]if they are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted[74] or for the purposes for which goods of the same type are normally used.[75] Finally they have to show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.[76]

No lack of conformity can however be invoked, if at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.[77] Moreover, the seller will not be bound by public statements, if he can establish that the buyer could not have been aware of those statements, that the statements had been

[62] Recital 49 Consumer Rights Directive.
[63]Guidance document Consumers Rights Directive, 54.
[64]Guidance document Consumers Rights Directive, 54.
[65] Art. 16 (d) Consumer Rights Directive.
[66] Art. 16 (e) Consumer Rights Directive.
[67]Guidance document Consumers Rights Directive, 55.
[68] Art. 16 (i) Consumer Rights Directive.
[69] Art. 16 (m) Consumer Rights Directive.
[70] Art. 16 (m) *in fine* Consumer Rights Directive.
[71] Art. 2.1 *jo*. 5.1 Consumer Sales Directive.
[72] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)
[73] Art. 2 2 a) Consumer Sales Directive.
[74] Art. 2 2 b) Consumer Sales Directive.
[75] Art. 2 2 c) Consumer Sales Directive.
[76] Art. 2 2 d) Consumer Sales Directive.
[77] Art. 2.3 Consumer Sales Directive.

corrected by the time of the conclusion of the contract or that the buyer cannot have been influenced by those statements.[78]

Procedure

In order to benefit from the rights under the Consumer Sales Directive, the consumer is bound to inform the Seller of the lack of conformity. Conditions are however not strict on this point: the Directive merely states that member states may provide in their legislation that the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity.[79] For example the Belgian legislator choose not to include such limited notification period, but entitles the seller to stipulate a notification period in the contract. Such period may however not be shorter than two months.[80]

After notifying the seller of the lack of conformity, the buyer has the burden to establish that the lack of conformity existed already at the time of delivery, or that there was at least a latent non-conformity at that time.[81] If the damage takes place within the first six months, the damage is however presumed to have existed at the time of the delivery, placing the burden of proof upon the seller.[82] While it will be difficult for the consumer to make a case after the six months' time limit, in case of damage within the first six months it will often be very difficult for the seller to rebut the pre-existence of damage. Therefore the chance that he will have to repair, replace or allow for a termination of the contract or price reduction are very high. This can again lead to severe costs for the webshop. A possible additional costs for the webshop is the cost of the removal of the goods that were installed by the buyer in good faith before the damage became apparent.[83] Obviously the seller cannot claim a compensation from the buyer for the replacement or reparation of the goods.[84]

Right for redress

The position of the webshopagainst a previous seller in the chain or the producer of the goods very much depends upon the applicable national law. Even though the Directive provides for a right for redress against those parties, as Jeloschek[85]states, this article lacks teeth: the Directive merely states that the remedies available to the seller shall be determined by national contract law, which might provide for a less favourable regime. Recital 9 *in fine* even explicitly states that the freedom of contract within the marketing chain shall not be infringed. Belgian law is here however accommodating the end seller, as it provides that when exercising this right for redress, the seller against whom this right is exercised can't invoke any exoneration or limitation clauses.[86]As general contract law applies here, this also allows the webshop, if he has sufficient bargaining position, to make the contract with the previous seller back to back with the consumer sales law, in order to avoid any exposure to liability.

Possibilities to manipulate exposure to risk?

Confronted with the far-going protection of the consumer under EU Sales law, webshops might be tempted to try to keep their cases out of the EU courts, and to include a choice of law for a third country legislation, with less strict consumer protection rules. The EU anticipated such attempts however and both the Brussels I (bis) Regulation,[87] determining the competent court, as the Rome I Regulation,[88] determining

[78] Art. 2.4 Consumer Sales Directive.
[79] Art. 5.2 Consumer Sales Directive.
[80] Art. 1649 quater §2 BW.
[81] See more in depth about latent non-conformity: Jeloschek, C. 2006, 59.
[82] Art. 5.3 Consumer Sales Directive.
[83] ECJ C-65/09, C-87/09, 16 June 2011, CML Rev. 2012, 793 en http://www.kluwerlawonline.com; DCCR 2013, 98, 49.
[84]ECJ C-404/06, 17 April 2008, DCCR 2008, afl. 79, 75.
[85] C. Jeloschek, 2006, 16.
[86] Art. 1649 sexies BW.
[87] Regulation (EU) No 1215/2012 of the European Parliament and the council of 12 December 2012on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(recast), *O.J.* 20 December 2012, L351/1.

the applicable law, strongly protect the consumer on this point.[89]Moreover, also in case of claims against the carrier forum shopping will in general not offer a solution to circumvent the mandatory liability regimes. Recent case law offers some possibilitiesto get around carriage law, but only in specific situations.

Consumers: court consumer & legislation consumer

According to article 18 of the Brussels I (bis) Regulation, proceedings against the consumer can only be brought in the courts of the member state where the consumer is domiciled.[90] The consumer himself can choose to bring a claim in his member state or in the member state in which the seller is domiciled.[91] Consequently, the case can only be brought outside the consumer's member state if the consumer chooses so. A choice of court agreement derogating from this principle in invalid in case of consumer contracts, except if this is agreed upon after the conclusion of the contract, if it allows the consumer with an additional forum or if both consumer and seller are domiciled or have their habitual residence in the same member state and there is a choice for this member state.[92]

Also the governing law will in principle be the law of the habitual residence of the consumer in case of contracts with a webshop.[93] Even though here a choice of law is possible, still this choice may not deprive the consumer of the protection offered by mandatory provision of his national law.[94] As all aforementioned provisions from the Consumer Sales Directive and the Consumer Rights Directive are mandatorily applicable, even in case of a choice of law for a third country, these provisions will still apply.

Cargo claims: convention member state unless specific contracts

Principle: competent court is court member state

Under the three aforementioned carriage conventions (CMR, COTIF-CIM and the Montreal Convention), there are two limits to jurisdiction clauses: first of all jurisdiction clause only creates a prorogation of jurisdiction but no derogation,[95] meaning that parties can only create an additional jurisdiction, next to the place of taking over or delivery of the goods and the residence of the respondent. Because of article 41 CMR, according to which parties cannot deviate from the convention, including an exclusive forum clause is therefore null and void.[96]Moreover the possibility to include a jurisdiction clause is limited to courts in member states to the convention, thus barring the possibility to include a third country in the forum clause. Obviously such courts will always apply the convention and thus the seller can't escape the limited liability.Under COTIF-CIM[97] and the Montreal Convention,[98] the same principles apply.

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[88] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *O.J.* 5 July 2008, L 177/6.

[89] See for example Recital 18 Brussels I (bis) Regulation: *"In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.",*see also Recital 25 Rome I Regulation.

[90] Art. 18.2 Brussels I (bis) Regulation.

[91] Art. 18.1 Brussels I (bis) Regulation.

[92] Art. 19 Brussels I (bis) Regulation.

[93] Art. 5.1 Rome I Regulation.

[94] Art. 7.2 Rome I Regulation.

[95] Art 31.1 CMR; Antwerp 30 January 1980, (1983-84) RW 2171; Rb. 's Gravenhage 23 November 1983 [1984] S&S 114. See also: De Meij, P.2003, 158; Hartenstein O.andReuschle, F. 2010, 452-453. See for further references to case law and doctrine supporting both positions: Haak, K.F. 1986, 282; Grignon-Dumoulin, S. 2006, 611.

[96] See for an example on this point: Rb. Rotterdam 20 August 2014, Samskip t Stante, ECLI:NL:RBROT:2014:7910, www.rechtspraak.nl (Since it was clear from the formulation of the clause that parties intended to give exclusive jurisdiction to the court named, not only was the exclusivity not accepted, but the entire clause was held void, and thus the court of Rotterdam declined jurisdiction in the CMR-dispute.

[97] Article 46 COTIF-CIM.

[98] Article 33 Montreal Convention.

Exception: inapplicability of the Conventions

In the recent years, in Belgian, Dutch and German case law developments have taken place that limit the scope of CMR and COTIF-CIM. These developments give opportunities to webshops to get a higher compensation from carriers in case of loss, damage or delay. However, due to the fact that an exclusive forum clause is impossible, the competence of the Dutch, Belgian or German judge can never be ascertained before the claim is made.

According to the Belgian courts no agreement for the carriage of goods by road exists if the means of transportation is not determined in the contract.[99] Therefore CMR (or COTIF-CIM in case of carriage of goods by rail) doesn't apply to such contract. This case law is extremely relevant for e-commerce, as most parcel delivery firms include options clauses, allowing a free choice of the means of transportation in their contracts.[100] The abovementioned DPD-case offers an example of this case law, but this rule, which was first applied by the Supreme Court in 2004,[101]is taken over by many other lower courts.[102]If CMR is not applicable, general contract law applies, allowing for compensation in full. Also a choice of law for a third country could be made in such situation, however.

Similar to the Belgian case law, the German and the Dutch Supreme Courts decided that article 1 CMR is to be interpreted in such a way that road stages of a multimodal transport contract are not to be considered as contracts for the carriage of goods by road and that therefore CMR does not apply *de jure* to a road part of a multimodal transport.[103] An Important difference from the situation in Belgian situation is that Dutch[104] and German[105] national law contain multimodal provisions, according to which the Conventions would apply again. Parties can in such case include however an exclusive forum clause combined with a choice of law for a third country, and keep their claim outside the Dutch or German Courts. That happened also in the aforementioned cases.

A problem is however, that the competence of Belgian, Dutch or German courts can't be ascertained at the time of the conclusion of the contract, due to the invalidity of exclusive jurisdiction clauses (see supra). As courts in other countries, such as the UK do apply CMR and COTIF-CIM to freight integration contracts and multimodal contracts,[106] the applicability of these conventions remains uncertain and depends on the court first seized.

Conclusion

E-commerce is growing rapidly in Europe. Even though there is a strong potential, for webshops there are also important risks connected to starting a business in Europe. Mandatory EU consumer law places the risk for damage during transport, for damage after delivery and even for changed consumer preferences with the webshops. Of course this protective regime can contribute to the credibly, and thus to the growth of e-

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[99] This issue is discussed more indepth in some of my earlier publications: Verheyen, W.2014 I; W. Verheyen, 2012 JIML 364-371; W. Verheyen, 2013; Verheyen, W. 2014 (II)

[100] See for example Art. 14. 1 FEDERAL EXPRESS conditions of carriage for Europe, the middle east, the Indian subcontinent and Africa (Effective from November 4, 2011; Art. 4 b) TNT EXPRESS TNT.

[101] Cass. 8 November 2004 *TNT / Mitsui Marine and Sony* [2004] Arr.Cass. 1767; (2006) ETL 228; [2004] Pas., 1741; (2006) RHA 3; (2007-08) RW 1781; (2005) TBH 512.

[102] Brussel 16 June 2010 and 2 September 2011 (2012) DAOR 21 Antwerpen 31 Oktober 2011, 2010/AR/875, *N.V. DPD Belgium v. P.J. Timmermans*(2013) ETL 82; Kh. Hasselt 9 December 2008, AR 07/2102 (unpublished); Antwerpen 30 January 2012, 2010/AR/1670, TNT express NV / Alante Europe N.V. e.a., *NJW* 2012, 510, note Verheyen, W.

[103] BGH 17 July 2008, IZR181/05 (2008) BeckRS 16669; (2008) LSK 380432; (2008) NJW 2782; (2009) VersR 239; HR 1 June 2012 (2012) NJB 70, (2012) NJB 1369, (2012) RvdW 767, [2012] S&S 95, (2012) NJ 516.

[104]Art. 8:41 NBW; Van Beelen, A.1996, 83-139.

[105] § 452, a HGB; R. Herber, 2001, 102-103; M. Paschke, 2011, n°.; I. Koller, 2007, n° 1; R.Th. Schmidt, 2008, 132-133 .

[106] Quantum Corp Ltd v Plane Trucking Ltd (CA) [2002] EWCA Civ 350; [2002] 1 W.L.R. 2678; [2003] 1 All E.R. 873; [2002] 2 All E.R. (Comm) 392; [2002] 2, Lloyd's Rep., 25; [2002] C.L.C. 1002; (2002) 99(20) L.S.G. 31; *Times* 18 april 2002; Datec Electronic Holdings Ltd v United Parcels Service Ltd HOL 16 mei 2007, [2007] UKHL 23; [2007] 1 W.L.R. 1325; [2007] 4 All E.R. 765; [2007] 2 All E.R. (Comm) 1067; [2007] Bus. L.R. 1291; [2007] 2, Lloyd's Rep., 114; [2007] 1 C.L.C. 720; [2007] R.T.R. 40; (2007) 151 S.J.L.B. 670; *Times* 18 May 2007.

commerce in Europe. The counter side is however, that the webshop stays behind with a great exposure to risk, while possibilities to take redress are lacking in case of changed consumer preferences and are very limited in case of damage during transportation. Even though the incorporation contractual clauses might decrease to some extend the exposure to risk, consumer law doesn't offer a very big playing field for such provisions. Therefore, it is advisable to try to make the contracts with carriers (by means of a declaration of value or a special interest in delivery) and the previous seller back to back with the exposure under consumer law. Irrespective of the fact whether such clauses are included, still webshops wishing to start business in Europe are very much advised to take up insurance or alternatively to take sufficient provisions for loss as in EU e-commerce law, customer really is king.

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